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## Bery v. New York: Do Artists Have a First Amendment Right to Sell and Display Art in Public Places

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*Bery v. New York*: DO ARTISTS HAVE A FIRST AMENDMENT  
RIGHT TO SELL AND DISPLAY ART IN  
PUBLIC PLACES?

I. INTRODUCTION

Since 1993, artists have been fighting a war on the streets of New York City.<sup>1</sup> The artists oppose the General Vendors Law,<sup>2</sup> which prohibits general vendors from selling their goods in public places without a license.<sup>3</sup> Under the law, artists face a dilemma: they can be arrested if they sell their art without a license, but licenses are virtually impossible to obtain.<sup>4</sup> As a result, many artists choose to sell their work without permits, facing the possibility of arrest.<sup>5</sup>

In *Bery v. New York*,<sup>6</sup> the United States Court of Appeals for the Second Circuit addressed the issue of whether a regulation that prohibits selling art in public places without a license violates the First Amendment rights of artists.<sup>7</sup> The court held that the General Vendors Law, as applied to artists, was unconstitutional under the First Amendment.<sup>8</sup>

This Note will examine the court's decision in *Bery* to determine its place in relevant First Amendment precedent. Section II

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1. See Bruce Lambert, *Fighting for the Freedom to Sell Art on the Streets*, N.Y. TIMES, Oct. 24, 1993, S13 at 6. As one commentator noted, art is the battleground for America's most intensely political and deeply personal wars. Daniel Mach, Note, *The Bold and the Beautiful: Art, Public Spaces, and the First Amendment*, 72 N.Y.U. L. REV. 383 (1997).

2. NEW YORK CITY, N.Y., ADMIN. CODE, § 20-453.

3. See *id.* There are certain exceptions to the law. See New York City, N.Y. Local Law 33 (1982) amending NEW YORK CITY, N.Y., ADMIN. CODE, § 20-453. No license is required to sell written materials, such as newspapers and magazines. See *id.* In addition, all veterans who qualify receive a license. See *id.*

4. See Nicole Gaouette, *Conflict on the Streets: Artists v. N.Y.C.*, CHRISTIAN SCIENCE MONITOR, Feb. 14, 1996, Arts at 11. For a discussion of the difficulty artists faced in obtaining licenses, see *infra* notes 20-21 and accompanying text.

5. For a discussion of the consequences artists suffer as a result of these arrests, see *infra* note 22 and accompanying text.

6. 97 F.3d 689 (2d Cir. 1996), *cert. denied*, 117 S.Ct. 2408 (1997).

7. See *id.* at 694-98. For a discussion of the facts of *Bery*, see *infra* notes 14-33 and accompanying text.

8. See *id.* at 698. The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I.

summarizes the facts of *Bery*.<sup>9</sup> Section III provides background and examines prior court decisions.<sup>10</sup> Section IV examines the *Bery* court's decision and its reasoning.<sup>11</sup> Section V discusses whether the *Bery* court's decision was in line with prior First Amendment decisions.<sup>12</sup> Finally, Section VI discusses the impact of the *Bery* decision on First Amendment jurisprudence and the extent of a city's ability to regulate the sale of art on the streets.<sup>13</sup>

## II. FACTS

Pursuant to the General Vendors Law,<sup>14</sup> no individual can exhibit, sell, or offer goods for sale in public places in New York City unless the individual first obtains a general vendors license.<sup>15</sup> Un-

9. For a discussion of the facts of *Bery*, see *infra* notes 14-33 and accompanying text.

10. For a discussion of relevant First Amendment law, see *infra* notes 34-102 and accompanying text.

11. For a discussion of the *Bery* court's reasoning and analysis, see *infra* notes 103-32 and accompanying text.

12. For a critical discussion of the court's decision in *Bery*, see *infra* notes 133-57 and accompanying text.

13. For a discussion of the potential impact that the *Bery* decision may have on First Amendment jurisprudence and the regulation of art sales on city streets, see *infra* notes 158-68 and accompanying text.

14. NEW YORK CITY, N.Y., ADMIN. CODE § 20-453 et seq.

15. *See id.* The relevant language of the statute provides that:

It shall be unlawful for any individual to act as a general vendor without having first obtained a license in accordance with the provisions of this subchapter, except that it shall be lawful for a general vendor who hawks, peddles, sells or offers to sell, at retail, only newspapers, periodicals, books, pamphlets or other similar written matter, but no other items required to be licensed by any other provision of this code, to vend such without obtaining a license therefor.

*Bery v. New York*, 906 F. Supp. 163, 165 (S.D.N.Y. 1995) (citing NEW YORK CITY, N.Y., ADMIN. CODE § 20-453). The ordinance defines a general vendor as any person who "hawks, peddles, sells, leases or offers to sell or lease, at retail, [non-food] goods or services . . . in a public space." *Bery v. New York*, 97 F.3d 684, 692 (2d Cir. 1996) (citing NEW YORK CITY, N.Y., ADMIN. CODE § 20-452(b)), *cert. denied*, 117 S.Ct. 2408 (1997). Public space is defined as:

[a]ll publicly owned property between the property lines on a street as such property lines are shown on the City Record including . . . a park, plaza, roadway, shoulder, tree space, sidewalk or parking space between such property lines . . . [as well as] publicly owned or leased land, buildings, piers, wharfs, stadiums and terminals.

*Id.* (citing Administrative Code § 20-452(d)). An important purpose of the law was to prevent congestion. *See generally* Al-Amin v. New York, 979 F. Supp. 168 (E.D.N.Y. 1997).

Violation of the General Vendors Law was a misdemeanor punishable by fine, imprisonment, or civil penalties. *See Bery*, 97 F.3d at 692 (citing NEW YORK CITY, N.Y., ADMIN. CODE § 20-452(b)). If a violator was criminally convicted, he or she was subject to a fine of not less than \$250 nor more than \$1000 and/or imprisonment of up to three months. *See id.* (citing NEW YORK CITY, N.Y., ADMIN. CODE § 20-472(a)). If a violator was held civilly liable, he or she was subject to the same

fortunately for artists, compliance with the law was difficult because the total number of licenses throughout the city was limited to 853.<sup>16</sup> The law, however, did not apply equally to everyone. For example, despite this licensing cap, veterans could always obtain a license, regardless of how many licenses the city had issued.<sup>17</sup> Additionally, the sale of written matter was exempted from the license requirement.<sup>18</sup>

Obtaining a license was difficult, if not impossible, for artists who were required to comply with the law.<sup>19</sup> As a result, many art-

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fine, together with a fine of \$250 for each day of the unlicensed activity. *See id.* (citing NEW YORK CITY, N.Y., ADMIN. CODE § 20-472(c)(1)). Additionally, police officers were authorized to seize the items being sold, and the items were subject to forfeiture. *See id.* (citing NEW YORK CITY, N.Y., ADMIN. CODE §§ 20-468 and 20-472(a)).

Even if a vendor obtains a license, the General Vendors Law restricts the vendor's ability to sell and display his or her goods. *See id.* For example, Administrative Code §§ 20-465(a), (b), (e), (f), (k), (m), (n) and (q) restrict the placement, location and size of vending displays and prohibit vending where an authorized city employee has notified the vendor that there are exigent circumstances which require the vendor to move. *See Bery*, 97 F.3d at 692. Additionally, vending of all goods except for written matter is not permitted in a park unless the vendor has obtained written authorization from the Department of Parks and Recreation. *See id.* (citing NEW YORK CITY, N.Y., ADMIN. CODE § 20-465(j)). Vending is also banned from certain zoning districts and a specific section of downtown Manhattan. *See id.* (citing NEW YORK CITY, N.Y., ADMIN. CODE § 20-465(g)).

16. *See Bery v. New York*, 906 F. Supp. 163, 166 (S.D.N.Y. 1995). In 1979, the General Vendors Law was amended to limit the total number of licenses in effect at any given time to 853. *See id.* Consequently, licenses became virtually impossible to obtain. *See Anne Robertson, City Eyes Issues of Street Artists*, NEWSDAY, Nov. 30, 1993 at 33. New York conceded at oral argument that the waiting list for a license was between 500 to 5000 persons. *Bery*, 97 F.3d at 699.

17. *See Bery*, 906 F. Supp. 163 (S.D.N.Y. 1995) (citing N.Y. Gen. Bus. L. § 32(1)). The legislative history indicates the right to sell goods is very important for disabled veterans who have not been able to find any means of support. *See New York Legis. Annual 1991* at 387-89. According to the legislature, these veterans were injured in the service of the United States, and therefore they deserve assistance wherever possible. *See id.* As a result, under the New York State General Business Law, any veteran who qualifies for a vending license must be issued one. *See Bery v. New York*, 906 F. Supp. 163 (S.D.N.Y. 1995). Therefore, at the time of the *Bery* decision, 1,193 licenses were in effect. *See id.*

18. *See id.* Initially, Section 20-453 of the General Vendors Law required all general vendors to have a license. *See id.* However, in 1982, the law was amended to exempt vendors or newspapers, books, or other written matter. *See id.* The City Council described the amendment as "consonant with the 'principles of free speech and freedom of the press.'" *Bery*, 97 F.3d at 692.

19. *See Robertson, supra* note 16 at 33. *See also supra* note 16 and accompanying text.

ists sold their art in the streets without licenses.<sup>20</sup> Often, police arrested the artists and seized their artwork.<sup>21</sup>

The plaintiffs<sup>22</sup> in *Bery v. New York* sought a preliminary injunction to prevent New York City from enforcing the General Vendors Law against them.<sup>23</sup> They argued that the ordinance violated their First Amendment right to freedom of expression<sup>24</sup> and their rights under the Equal Protection Clause of the Fourteenth Amend-

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20. See Robertson, *supra* note 16 at 33. Many artists struggled to get licenses, but failed. For example, Julio Romano, an artist, stated, "[w]ay before I was a street artist, I tried everything to get a permit but got turned down." *Id.* See also Adine Y. Kernberg, Note, *The Right to Bear Art: The Impact of Municipal Anti-Peddling Ordinances on the First Amendment Rights of Artists*, 18 COLUM-VLA J.L. & ARTS 155 (1993). Kernberg noted that in 1993 the waiting list for a license had been closed for six years. See *id.* at 190 n.9 (citing Telephone Interview with Sherry Speaker, Community Assistant at New York City Department of Consumer Affairs (Dec. 2, 1993)).

21. See Lambert, *supra* note 1 at 6. Between July of 1993 and July of 1994, police in Manhattan made over 100 arrests of artists for peddling their original paintings, sculptures and woodcarvings on city streets without permits. See Sam Walker, *New York Reins in Street Art*, CHRISTIAN SCIENCE MONITOR, July 14, 1994, Arts at 11. The arrests of artists caused a lot of controversy, particularly in communities like Soho. See *id.* There, the presence of the street artists causes congestion and crowding. See *id.* However, many business owners support the artists. See *id.* For example, Robert Ellis Patterson, a consultant with Martin Lawrence Galleries, stated "Soho is known as an art center . . . . The street artists add color, and their art is legitimate. Many of the artists in this gallery got their start on the streets . . . . " *Id.*

22. The plaintiffs in *Bery* were visual artists who sold their artwork on public sidewalks and an artists' advocacy organization called Artists for Creative Expression on the Sidewalks of New York City. See *Bery*, 97 F.3d at 691. Most of the plaintiffs had been arrested, or threatened with arrest, had received summonses, been fined, or have had their works confiscated when they sold art on the street without a license. See *Bery*, 906 F. Supp. at 166. One plaintiff desired to sell her art on the sidewalks, but had not done so out of fear of arrest and destruction of her work. See *Bery*, 97 F.3d at 691-92.

23. See *Bery*, 97 F.3d at 691-92. The plaintiffs, including Robert Bery, had been arrested, threatened with arrest, or harassed by law enforcement officials for attempting to display and sell their creations in public spaces in the City without a general vendors license. See *id.* Some of the plaintiffs had their artwork confiscated and damaged. See *id.* One artist stated, "Police confiscation of our materials must stop, since we are not insured on the streets . . . . If our stuff is defaced or stolen, we have no backups." Anne Robertson, *supra* note 16 at 33. At least one plaintiff in *Bery* asserted that she desired to sell her artwork on New York City sidewalks, but was afraid to do so because of the possibility that she could be arrested or her work could be destroyed. See *Bery*, 97 F.3d at 691-92.

24. See *Bery*, 906 F. Supp. at 165. The plaintiffs did not argue that their paintings were political, nor did they allege that the city was motivated by any animus against artists. See *id.* Rather, they argued that the First Amendment's protection of free speech extends to all works of fine art. See *id.*

ment.<sup>25</sup> The district court denied the motion,<sup>26</sup> holding that although art is protected by the First Amendment in certain circumstances, the City does not necessarily violate the First Amendment by regulating the sale of art in public areas.<sup>27</sup> The district court found that the plaintiffs did not show that the ordinance unconstitutionally interfered with the plaintiffs' freedom of speech under the First Amendment.<sup>28</sup> Additionally, the District Court held that the ordinance did not violate the Equal Protection Clause of

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25. See *id.* at 166. The plaintiffs' equal protection argument was based on the fact that the ordinance exempted sellers of "newspapers, periodicals, books, pamphlets, or other similar written matter" from the licensing requirement. *Id.*

26. See *id.* at 163.

27. See *id.* at 167. The district court stated that:

The text of the First Amendment explicitly refers to "speech" and "the press." The precise nature of First Amendment protection for painting and sculpture with no verbal elements has not been addressed by the federal courts. Although several opinions include generalized statements concerning the protection of artistic works by the First Amendment . . . those cases did not present the issues raised here.

*Id.* The court stated that while there is some expressive content in fine art, it is not the type of expression which is meant to receive First Amendment protection. See *id.* Rather, First Amendment protection is meant to prevent government censorship. See *id.* In its analysis, the court distinguished the New York City Criminal Court's holding in *People v. Bery*. See *id.* (distinguishing *People v. Bery*, N.Y.L.J., May 20, 1994). The court's distinction was based on the fact that in the criminal case, the defendant's work expressed a clear political viewpoint, and in some cases involved the written word. See *id.* at 167. Additionally, the court relied on *People v. Milbry*, 140 Misc. 2d 476 (N.Y. City Crim. Ct. 1988) and *San Francisco Street Artists Guild v. Scott*, 37 Cal. App. 3d 667 (App. Ct. 1974). For a discussion of the facts and holding of *Milbry*, see *supra* notes 96-102 and accompanying text. For a discussion of the court's holding in *San Francisco Street Artist's Guild*, see *supra* notes 48-49 and accompanying text. The plaintiff attempted to distinguish these cases, arguing that there was no evidence in these cases to show the plaintiffs were unable to obtain a license. See *Bery*, 906 F. Supp. at 167. However, the district court did not embrace this argument. See *id.* Rather, the court relied on the distinction between content-based and content-neutral regulations. See *id.* at 168. For a discussion of the distinction between content-based and content-neutral regulations, see *supra* notes 67-76.

28. See *id.* at 170. Applying the test articulated by the Supreme Court in *United States v. O'Brien*, the court found that the regulation of activities in public areas was clearly within the City's constitutional power, the City's interest in keeping the streets free of congestion furthered an important or substantial interest which was unrelated to the suppression of free expression, and the regulation furthered that interest. See *id.* at 168. *O'Brien* lays out a four-part test which states that a content-neutral government regulation is constitutional if 1) it is within the constitutional power of the government; 2) it furthers an important or substantial governmental interest; 3) the governmental interest is unrelated to the suppression of free expression; and 4) the incidental restriction on First Amendment freedoms is no greater than essential to the furtherance of that interest. See *United States v. O'Brien*, 391 U.S. 367, 367-77 (1968). For a discussion of the holding of *O'Brien*, see *supra* notes 80-81 and accompanying text.

the Fourteenth Amendment.<sup>29</sup> Therefore, the district court denied the plaintiffs' motion for a preliminary injunction.<sup>30</sup>

On appeal, the United States Court of Appeals for the Second Circuit reversed the district court's decision.<sup>31</sup> The Second Circuit held that the ordinance violated both the First Amendment and the Equal Protection Clause of the Fourteenth Amendment.<sup>32</sup> Therefore, the Second Circuit reversed the decision of the district court and granted the plaintiffs' motion for preliminary injunction.<sup>33</sup>

### III. BACKGROUND

#### A. First Amendment Protection of Art

The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech."<sup>34</sup> It is well settled that the First Amendment protects various forms of expression in addition to oral speech.<sup>35</sup> Clearly, however, the protection provided to these forms of expression by the First Amendment is not unlimited.<sup>36</sup>

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29. See *Bery*, 906 F. Supp. 170. The court found that "art is farther from the core [of the First Amendment] than the written word." *Id.*

30. See *id.*

31. See *Bery*, 97 F.3d at 689.

32. See *id.* at 694-96, 699. For a discussion of the Second Circuit's decision in *Bery*, see *infra* notes 103-32 and accompanying text.

33. See *Bery*, 97 F.3d at 699.

34. U.S. CONST., amend. I. Municipal ordinances are within the scope of this limitation on governmental authority. See *Lovell v. City of Griffin*, 303 U.S. 444 (1938) (noting it is well settled that municipal ordinances adopted under state authority are within reach of First Amendment).

35. See *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) (stating music is protected form of expression under First Amendment); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557-58 (1975) (finding live drama receives First Amendment protection); *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 505-06 (1969) (holding right to wear armbands to protest Vietnam War protected by First Amendment); *Brown v. Louisiana*, 383 U.S. 131, 141-42 (1966) (stating peaceful demonstration is protected by First Amendment).

In *West Virginia State Board of Education v. Barnette*, the Supreme Court considered the constitutionality of a Board of Education resolution which required all students to participate in the flag salute. 319 U.S. 624, 626 (1943). The Court found that the flag salute was a symbolic way to communicate ideas, and therefore protected by the First Amendment. See *id.* The court stated that "[w]e think the action of local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invade the sphere of intellect and spirit which it is the purpose of the First Amendment of our Constitution to reserve from all official control." *Id.* at 642.

36. See Katherine F. Rowe, *Visual Art and the First Amendment; Moral Rights; Re-sale Royalties*, 312 PLI/Pat 307 (1991). Rowe notes that conduct is not protected by the First Amendment unless it is expressive. See *id.* See also *Al-Amin v. New York*, 979 F. Supp. 168 (holding General Vendors Law constitutional as applied to sale of perfume oil and incense sticks by Muslims because sale lacks inherently communi-

As it is a difficult task to determine which communications will receive First Amendment protections, courts have developed various criteria for different situations.<sup>37</sup> For example, in *Joseph Burstyn, Inc. v. Wilson*,<sup>38</sup> the Supreme Court concluded that motion pictures were protected by the First Amendment because they were a significant medium for the communication of ideas.<sup>39</sup> The Court noted that each method of expression has its own peculiarities, and therefore its own rules.<sup>40</sup> Other courts have examined factors including whether the conduct conveys political or social thought,<sup>41</sup> whether the normal observer would consider the conduct to be communicative<sup>42</sup> and whether the medium of communication may affect public attitudes and behavior.<sup>43</sup>

Applying these tests, courts have held that visual art receives First Amendment protection under certain circumstances.<sup>44</sup> In

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cative element). Moreover, even protected speech may be limited by time, place and manner restrictions. *See Rowe, supra*.

37. *See, e.g., Yurkew v. Sinclair*, 495 F. Supp. 1248 (D. Minn. 1980) (examining whether tattooing is First Amendment speech). The court declined to decide whether or not a tattoo itself is art or speech, because the plaintiff stated he had no interest in displaying finished tattoo images. *See id.* at 1254. Rather, the court determined that tattooing was not protected by the First Amendment for several reasons. *See id.* First, there was no showing that political or social thought was conveyed by the tattoos. *See id.* at 1254-44. Second, a normal observer would not regard the injection of dyes as communication. *See id.* Third, tattooing could not take place in a public forum due to the sterile conditions required. *See id.* Finally, tattooing was not a significant medium for the communication of ideas. *See id.*

38. 343 U.S. 495 (1952).

39. *See id.* at 501. *See also Young v. New York City Transit Authority*, 903 F.2d 146 (2d Cir. 1990) (holding First Amendment applies where activity is intertwined with particularized message).

40. *See Burstyn*, 343 U.S. at 503. The Court stated that "[T]he basic principles of freedom of speech and of the press, like the First Amendment's command, do not vary. Those principles, as they have frequently been enunciated by this Court, make freedom of expression the rule." *Id.*

41. *See Close v. Lederle*, 424 F.2d 988 (1st Cir. 1970) (finding artist had only minimal constitutional interest in displaying non-political art in university hallway). For a discussion of the facts and holding of *Close*, see *infra* notes 45-47 and accompanying text.

42. *See Spence v. Washington*, 418 U.S. 405, 408-10 (1974) (finding student's act of hanging U.S. flag upside down from window with peace symbol made of removable black tape was conduct "sufficiently imbued with elements of communication" to fall within First Amendment).

43. *See Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) (holding motion pictures are organ of public opinion and therefore safeguarded by First Amendment).

44. *See Miller v. California*, 413 U.S. 15 (1973). In *Miller*, the Court noted that "in the area of freedom of speech and press the courts must always remain sensitive to any infringement on genuinely serious literary, artistic, political or scientific expression." *Id.* at 22-23. Despite the importance of art as a form of expression, visual art which has political content has generally received more protection than non-political art. *Compare Serra v. United States Gen. Serv. Admin.*, 847 F.2d



*Close v. Lederle*,<sup>45</sup> the First Circuit rejected the proposition that art receives as much constitutional protection as political or social speech.<sup>46</sup> Rather, the *Close* court pointed out that there are varying degrees of speech which should receive different levels of protection, depending on the subject matter.<sup>47</sup> In a prominent decision, the California Court of Appeals adopted this view in *San Francisco Street Artists Guild v. Scott*,<sup>48</sup> holding that sales of paintings, sculptures and beadwork did not reach the high level of expression protected by the First Amendment.<sup>49</sup> In *Piarowski v. Illinois Community College District 515*,<sup>50</sup> the Seventh Circuit endorsed a broad interpretation of the First Amendment's protection of visual art, finding that the First Amendment protects purely artistic expression as well

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1045 (2d Cir. 1988) (holding government did not violate artist's First Amendment rights by relocating non-political sculpture) and *Piarowski v. Illinois Community College Dist. 515*, 759 F.2d 625 (7th Cir. 1985) (holding college did not abridge faculty member's First Amendment rights when it ordered him to display his non-political art in another room) with *Sefick v. Chicago*, 485 F. Supp. 644, 648 (N.D. Ill. 1979) (holding city violated artist's First Amendment rights when it revoked permission to display statue which satirized mayor).

45. 424 F.2d 988 (1st Cir. 1970). In *Close*, the plaintiff, an art instructor at the University of Massachusetts, displayed some controversial paintings on the walls of a corridor in the Student Union. See *id.* at 989. The paintings included nudes displaying genitalia in "clinical detail," and paintings with titles such as "I'm only 12 and already my mother's lover wants me," and "I am the only virgin in my school." *Id.* at 990.

46. See *id.* at 989-90.

47. See *id.* at 990. The court stated "[c]ases dealing with students' rights to hear possibly unpopular speakers involve a medium and subject matter entitled to greater protection than plaintiff's art. Even as to verbal communication the extent of the protection may depend upon the subject matter." *Id.* at 990. (citing *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Garrison v. Louisiana*, 379 U.S. 64 (1964)). The court reconciled its holding with the Supreme Court's opinion in *Burstyn v. Wilson*, 343 U.S. 495 (1952), by stating that the *Burstyn* court recognized that there are degrees of speech. See *Close*, 424 F.2d at 990.

48. 37 Cal. App. 3d 667 (App. Ct. 1974). The plaintiffs in *San Francisco Street Artists Guild* wished to sell paintings and sculptures of tiny plants, dolls which represented public figures, paintings and sculptures, crocheted clothing, macramés made of beads, jewels and feathers, and similar objects. See *id.* at 669. The individual artists challenged the constitutionality of an ordinance prohibiting them from selling their wares on public streets without a license. See *id.*

49. The court recognized that the symbolic expression of political, economic, religious or social tenets was protected by the First Amendment and therefore subject to only limited control. See *id.* at 671 (citing *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969); *Tinker v. Des Moines Community Sch. Dist.*, 393 U.S. 503 (1969); *People v. Duffy*, 179 Cal. App. 2d Supp. 875 (1947)).

50. 759 F.2d 625 (7th Cir. 1985). Piarowski, the chairman of the art department at Prairie State College, displayed several controversial stained glass windows at a college art show. See *id.* at 627. The college requested that Piarowski remove the displays from the open mall area, offering an alternative area for display on the fourth floor. See *id.* at 628.

as political expression.<sup>51</sup> Although artistic expression receives First Amendment protection, the amount of protection may be limited.<sup>52</sup>

Other factors may affect the amount of First Amendment protection accorded to visual expression. For example, in *Serra v. United States General Services Administration*,<sup>53</sup> the United States Court of Appeals for the Second Circuit held that First Amendment protection of art is limited where the artistic expression belongs to the government.<sup>54</sup> In dicta, the court noted that even if Serra maintained First Amendment interests in his sculpture, the removal of the sculpture from Federal Plaza was constitutional for several reasons.<sup>55</sup> First, removal of the sculpture was a permissible time, place and manner restriction.<sup>56</sup> Second, relocation of the sculpture did

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51. See *id.* The *Piarowski* court distinguished *Close*, noting that the issue in *Piarowski* was relocation, rather than removal of the art. Additionally, the *Piarowski* court noted that unlike the corridor at issue in *Close*, the college mall in *Piarowski* was not frequented by children. See *id.* However, the *Close* court specifically noted that their holding did not rest on the presence of children. See *Close*, 424 F.2d 989, 990 n.2.

52. For a discussion of the limits on the First Amendment's reach, see *supra* note 36 and accompanying text.

53. 847 F.2d 1045 (2d Cir. 1988).

54. See *id.* (holding "artwork, like other non-verbal forms of expression, may under some circumstances constitute speech for First Amendment purposes") (citing *Doran v. Salem Inn, Inc.* 422 U.S. 922 (1975) (topless dancing); *Piarowski v. Illinois Community College*, 759 F.2d 625, 628 (7th Cir. 1985) (art)). In *Serra*, an artist brought an action to bar the United States General Services Administration from removing his sculpture from Federal Plaza. See *Serra*, 847 F.2d at 1046. The General Services Administration commissioned Serra to create the sculpture in 1979. See *id.* at 1046-47. The sculpture, entitled "Tilted Arc," is an arc of steel 120 feet long, 12 feet tall, and several inches thick. See *id.* at 1047. The sculpture was designed specifically for Federal Plaza. See *id.* Soon after the sculpture was completed, the General Services Administration began to receive complaints from community residents and federal employees, who felt that the sculpture took up previously open space. See *id.* In addition, the sculpture's steel began to oxidize, creating what the artist calls "a golden amber patina" and what the sculpture's critics call "rust." *Id.* The artist claimed that his sculpture was "site-specific" and that to move the sculpture would destroy it. See *id.* He argued that the General Services Administration's decision to remove the sculpture violated his rights under the Free Speech Clause of the First Amendment, and the Due Process Clause of the Fifth Amendment. See *id.* at 1048.

55. See *id.* at 1049-51.

56. See *id.* at 1049. Time, place and manner restrictions are valid "provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Id.* (citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). See also *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804-05 (1984) (holding ordinance which prohibited posting signs on public property was reasonable time, place and manner restriction). The *Serra* court noted that time, place and manner restrictions are valid even in public forums. *Serra*, 847 F.2d at 1049 n.1 (citing *Clark*, 468 U.S. at 293). For further

not preclude Serra from communicating his ideas in other ways.<sup>57</sup> Finally, the removal of the sculpture was not content-based.<sup>58</sup>

## B. First Amendment Analysis and Scrutiny

### 1. *Forum Analysis*

The first step in determining whether a government-imposed speech restriction is constitutional is to determine the forum in which the speech occurs.<sup>59</sup> There are three general categories of forums: traditional public forums,<sup>60</sup> limited public forums<sup>61</sup> and nonpublic forums.<sup>62</sup>

Historically, the government's power to restrict speech is weakest when the speech occurs in a traditional public forum.<sup>63</sup> Even in

discussion of the constitutionality of time, place and manner restrictions, see *infra* notes 91-95 and accompanying text.

57. See *Serra*, 847 F.2d at 1050. The court noted that Serra had already had six years to convey his message through the sculpture's presence in the Plaza. See *id.* "[T]he First Amendment protects the freedom to express one's views, not the freedom to continue speaking forever . . ." *Id.*

58. See *id.* The General Services Administration's main reasons for removing the sculpture were interference with the public's use of Federal Plaza and concern for public safety and graffiti. See *id.* However, in similar cases where the decision to remove art was content based, courts have found that the removal violated the artist's constitutional rights. See, e.g., *Sefick v. City of Chicago*, 485 F. Supp. 644 (N.D. Ill. 1979) (holding removal of sculpture which satirized mayor's snow removal efforts violated artist's constitutional rights because decision to remove was content-based).

59. See *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 800 (1985) (stating that extent to which government can limit speech depends on nature of forum); *Etheridge v. Hail*, 56 F.3d 1324, 1326-27 (11th Cir. 1995) (same).

60. Traditional public fora are those places which, by long tradition or government fiat have been devoted to assembly and debate. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983). Streets and sidewalks are clear examples of traditional public forums. See *Hague v. CIO*, 307 U.S. 496, 515 (1939). In *Hague*, the court wrote:

Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

*Id.*

61. Limited public forums are areas which have been created by the government specifically to provide an area in which expressive activity can take place. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983) (holding school's internal mail system is limited public forum).

62. Nonpublic forums are areas which are not traditionally public forums that the government has not opened for public use. See *id.* In a non-public forum, the government can impose reasonable, viewpoint-neutral, content-based restrictions. See *Searcey v. Harris*, 888 F.2d 1314, 1318 (11th Cir. 1989).

63. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. at 45-46 (stating that in public forums, government cannot prohibit all communicative ac-

public forums, however, the government can impose content-neutral time, place and manner restrictions on protected speech.<sup>64</sup> These restrictions are permissible as long as the regulation is content-neutral, narrowly tailored to serve a significant governmental interest and leaves open ample alternative channels for communication.<sup>65</sup> Additionally, the government can impose content-based exclusions if the regulation can survive strict scrutiny.<sup>66</sup>

## 2. *Content-Neutral v. Content-Based Restrictions*

The second step in determining whether a restriction on speech violates the First Amendment is to determine whether the restriction is content-based or content-neutral.<sup>67</sup> Generally, content-based restrictions are restrictions on communication based upon the message conveyed.<sup>68</sup> In contrast, content-neutral restrictions are restrictions that limit expression without regard to the message of the communication.<sup>69</sup>

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tivity); *United States v. Grace*, 461 U.S. 171, 180 (1983) (holding government's ability to restrict expression in public forums is very limited).

64. *See Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). In time, place and manner cases, the test for determining whether a restriction is content-neutral is whether the government has adopted a regulation to accomplish an independent goal which indirectly causes the restriction or suppression of speech. *See Barbara Hoffman, Law for Art's Sake in the Public Realm*, 16 COLUM-VLA J.L. & ARTS 39, 79 (Fall 1991).

65. *See id.* at 45-46.

66. *See Perry Educ. Ass'n*, 460 U.S. at 45-46. In order to meet strict scrutiny, the government must show that the regulation is necessary to achieve a compelling state interest, and that the regulation is narrowly tailored. *See id.* at 46.

67. *See generally* Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987).

68. *See Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622 (1994). In *Turner*, the Supreme Court wrote:

Government action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the government, contravenes th[e] essential right [of each person to decide for himself which ideas and beliefs deserve expression, consideration, and adherence]. Laws of this sort pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion.

*Id.* at 641. *See also* Stone, *supra* note 67. Stone gives several examples of content based restrictions, such as laws that prohibit seditious libel, ban the publication of confidential information, forbid the hiring of teachers who advocate violent overthrow of the government, or outlaw the display of the swastika in certain neighborhoods. *See id.* at 47.

69. *See* Stone, *supra* note 67. Examples of content neutral restrictions include laws that restrict noisy speeches near a hospital, ban billboards in residential communities, limit campaign contributions, or prohibit the mutilation of draft cards. *See id.* at 48. Stone notes that a hypothetical law which stated "[n]o person may make any speech; distribute any leaflet; publish any newspaper, magazine, or peri-

In *Turner Broadcasting Systems, Inc. v. FCC*,<sup>70</sup> the Supreme Court developed guidelines for courts to use to determine whether a regulation is content-based or content-neutral.<sup>71</sup> First, courts may examine whether a particular regulation of speech exists because of agreement or disagreement with the message it conveys.<sup>72</sup> Generally, laws that distinguish favored speech from disfavored speech based on ideas or views expressed are content-based; laws that confer benefits or impose burdens on speech regardless of the ideas or views expressed are content-neutral.<sup>73</sup>

The court's determination of whether a speech restriction is content-based or content-neutral will determine what level of scrutiny the court should apply.<sup>74</sup> When speech occurs in a public forum, and the regulation is content-based, the court will apply strict scrutiny, and the regulation will be struck down unless it is necessary to achieve a compelling state interest and narrowly tailored to serve that interest.<sup>75</sup> In contrast, content-neutral regulations are subjected to a much lower standard of review and may be upheld for various reasons.<sup>76</sup> As a result, the court's determination of

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odical; operate any radio, television, or cable system; or engage in any other form of public communication" would be content-neutral. *See id.* at 58.

70. 512 U.S. 622 (1994).

71. *See id.* at 642-43 (1994).

72. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). The *Ward* Court stated that:

The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. Government regulation of expressive activity is content neutral so long as it is 'justified without reference to the content of the regulated speech.'

*Id.* (citing *City of Renton v. Playtime Theatres, Inc.* 475 U.S. 41, 47-8 (1986); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

73. *See Turner*, 512 U.S. at 642.

74. *See Stone*, *supra* note 67 at 54.

75. *See id.* at 53. Stone notes that strict scrutiny almost invariably results in invalidation of the challenged restriction. *See id.*

76. *See id.* at 48-49. Stone indicates that the Court has articulated the following standards of review as applying to content-neutral regulations:

1. Some content-neutral restrictions do not even 'implicate' first amendment concerns.
2. Some content-neutral restrictions are constitutional if they are 'reasonable.'
3. Some content-neutral restrictions are constitutional if 'they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication.'
4. Some content-neutral restrictions are constitutional if they are within 'the constitutional power of the Government,' they further 'an important or substantial governmental interest,' the governmental interest is 'unrelated to the suppression of free expression,' and the restriction is 'no greater than is essential to the furtherance of that interest.'

whether the restriction is content-neutral or content-based can often be outcome-determinative. To evaluate the constitutionality of content-based restrictions, a court must determine the position of the speech in the scale of First Amendment values.<sup>77</sup> If the court finds that the restricted speech occupies a subordinate position, the court engages in categorical balancing.<sup>78</sup> Alternatively, if the speech does not occupy a subordinate position, the speech receives nearly absolute protection.<sup>79</sup>

The Supreme Court has provided a framework for analysis for courts examining the constitutionality of a content-neutral regulation. In *United States v. O'Brien*,<sup>80</sup> the Court articulated the applicable constitutional test for regulation of expressive conduct, stating:

a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no

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5. Some content-neutral restrictions are constitutional depending on the Court's resolution of 'the delicate and difficult task' of weighing 'the circumstances' and appraising 'the substantiality of the reasons advanced in support of the regulation.'

6. Some content-neutral restrictions are constitutional if they serve 'sufficiently strong, subordinating' interests by means of 'narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms.'

7. Some content-neutral restrictions are constitutional if they are 'necessitated by a compelling governmental interest' and are 'narrowly tailored to serve that interest.'

*Id.* (citations omitted).

77. See Stone, *supra* note 67 at 47-8.

78. Through categorical balancing, the court considers the relative value of the speech, and the risk of limiting high value expression through the restriction. See *id.* at 118 n.4. Examples of low value speech include obscenity, express incitement, commercial advertising, fighting words, and child pornography. See *id.* at 118 n.2. For a discussion of low value speech, see Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589 (1986).

79. See Stone, *supra* note 67 at 48. Stone notes that, outside of low-value speech, the Court has invalidated almost every content based restriction it has considered in thirty years. See *id.* at 48.

80. 391 U.S. 367 (1968). O'Brien and three companions burned their Selective Service registration certificates on the steps of a courthouse in Boston. See *id.* at 369. O'Brien was convicted of violating 50 U.S.C. 462(b) which states that a person is in violation of the statute if he "forges, alters, knowingly destroys, knowingly mutilates, or in any manner changes such certificate . . . ." *Id.* at 370. O'Brien argued that the statute was unconstitutional because it violated the First Amendment. See *id.*

greater than is essential to the furtherance of that interest.<sup>81</sup>

The Supreme Court applied the *O'Brien* test in *Members of City Council of Los Angeles v. Taxpayers for Vincent*.<sup>82</sup> In *Taxpayers for Vincent*, the Court addressed the constitutionality of an ordinance which prohibited the posting of signs on public property.<sup>83</sup> The central issue in *Taxpayers for Vincent* was whether the city's interest in eliminating visual blight was sufficiently substantial to justify the effect of the ordinance on appellees' expression, and whether the effect of the ordinance was no greater than necessary to accomplish the City's purpose.<sup>84</sup> The Court found that the city's interest in keeping the city clean and preventing unsightliness was sufficiently substantial.<sup>85</sup> Additionally, the Court found that the regulation was narrowly tailored.<sup>86</sup> The Court distinguished *Taxpayers for Vincent*

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81. *Id.* at 376. In Justice Harlan's concurring opinion, he states, however: I wish to make explicit my understanding that this passage does not foreclose consideration of First Amendment claims in those rare instances when an 'incidental' restriction upon expression, imposed by a regulation which furthers an 'important or substantial' governmental interest and satisfies the Court's other criteria, in practice has the effect of entirely preventing a 'speaker' from reaching a significant audience with whom he could not otherwise lawfully communicate.

*Id.* at 388-89.

82. 466 U.S. 789 (1984). In *Taxpayers for Vincent*, a group of supporters for a political candidate posted signs on utility poles throughout the city. *See id.* at 792. Pursuant to a municipal code which prohibited posting signs on utility poles, city employees removed all the posters. *See id.* at 793. The taxpayers filed an action seeking an injunction preventing enforcement of the ordinance. *See id.* The District Court found that "[t]he Los Angeles Planning and Zoning Code was enacted . . . to conserve and stabilize the value of property; to provide adequate open spaces for light and air; . . . to facilitate adequate provisions for community utilities and facilities and to promote health, safety, and the general welfare." *Id.* at 794 n.6.

83. *See id.* at 792-93.

84. *See id.* at 805.

85. *See id.* at 805-07. The Court concluded that "municipalities have a weighty, essentially esthetic interest in proscribing intrusive and unpleasant formats for expression." *Id.* at 806. *See also* *Metromedia v. City of San Diego*, 453 U.S. 490 (1981) (holding city's interest in avoiding visual clutter sufficient to justify prohibition of billboards); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976) ("[T]he city's interest in attempting to preserve [or improve] the quality of urban life is one that must be accorded high respect . . ."); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (holding city entitled to protect unwilling viewers against intrusive advertising by prohibiting political advertising on buses); *Kovacs v. Cooper*, 336 U.S. 77 (1949) (rejecting notion city is powerless to protect citizens from unwanted exposure to certain methods of expression which may legitimately be deemed public nuisance).

86. *See Taxpayers for Vincent*, 466 U.S. 789, 808-10 (1984) (holding that city's ban on signs burdened no more speech than necessary to eliminate visual clutter).

from *Schneider v. New Jersey*,<sup>87</sup> in which the court held that ordinances which prohibited canvassing and distribution of handbills in public streets violated the First Amendment.<sup>88</sup> The distinction rested on the fact that in *Taxpayers for Vincent*, it was the posted signs themselves which created the visual blight the city was trying to eliminate.<sup>89</sup> In contrast, in *Schneider*, an anti-littering statute would have allowed the expression but prohibited the visual blight.<sup>90</sup>

### 3. *Time, Place and Manner Restrictions*

The Supreme Court has interpreted the First Amendment to allow the government to restrict the time, place and manner of public forum speech.<sup>91</sup> For example, in *Clark v. Community for Creative Non-Violence*,<sup>92</sup> the Court held that the National Park Service could refuse to allow demonstrators to sleep in tents on the Mall in Washington to protest the plight of the homeless, without violating the demonstrators' First Amendment rights.<sup>93</sup> Subsequently, in

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87. 308 U.S. 147 (1939). In *Schneider*, five individuals appealed their convictions for violating city ordinances which prohibited canvassing and distribution of handbills. *See id.*

88. *See id.* at 165. In its analysis, the Court stated that:

Municipal authorities, as trustees for the public, have the duty to keep their communities' streets open and available for movement of people and property, the primary purpose to which the streets are dedicated. So long as legislation to this end does not abridge the constitutional liberty of one rightfully upon the street to impart information through speech or the distribution of literature, it may lawfully regulate the conduct of those using the streets.

*Id.* at 160.

89. *See Taxpayers for Vincent*, 466 U.S. at 809. The Court stated that: [t]he right recognized in *Schneider* is to tender the written material to the passerby who may accept or reject it, and who may thereafter keep it, dispose of it properly, or incur the risk of punishment if he lets it fall to the ground. . . . With respect to the signs [in *Taxpayers for Vincent*], however, it is the tangible medium of expression that has the adverse impact on the appearance of the landscape.

*Id.*

90. *See id.*

91. *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (holding New York City's decision to deny permit to hold concert to Rock Against Racism, based on previous problems with noise and crowd control at Rock Against Racism concert was permissible time, place and manner restriction); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984) (holding National Park Service's decision not to allow demonstrators to sleep in tents to protest plight of homeless was permissible time, place and manner restriction).

92. 468 U.S. 288 (1984). In *Clark*, the National Park Service issued a permit to Community for Creative Non-Violence (CCNV) to conduct a demonstration at Lafayette Park and the Mall, which are national parks in Washington, D.C. . *See id.* at 8. The Park Service denied CCNV's request that demonstrators be allowed to sleep in tents to demonstrate the plight of the homeless. *See id.*

93. *See id.*



*Ward v. Rock Against Racism*,<sup>94</sup> the Court articulated the relevant test for time, place and manner restrictions. Under *Ward*, the government can impose reasonable content-neutral restrictions on the time, place or manner of protected speech, as long as the restrictions are narrowly tailored to serve a significant governmental interest and leave ample alternative channels for communication of the information.<sup>95</sup>

### C. Prior Judicial Treatment of the General Vendors Law

In 1988, the New York City Criminal Court examined the New York General Vendors Law in *People v. Milbry*.<sup>96</sup> In *Milbry*, the defendant artist argued that written material and pictorial artwork should be treated identically in the requirements for a vendor's license.<sup>97</sup> In its analysis, the *Milbry* court found that pictorial artwork

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94. 491 U.S. 781 (1989). In *Ward*, Rock Against Racism sought an event permit to hold its concert at the Naumberg Acoustic Bandshell in New York City. See *id.* at 784-85. The city denied the permit, based on problems with noise and crowd control at previous Rock Against Racism concerts. See *id.* Rock Against Racism sought an injunction. See *id.* The Supreme Court upheld the noise regulations. See *id.*

95. See *id.* at 790. See also *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 808-15 (1984) (upholding ordinance prohibiting posting of signs on public property as valid time, place and manner restriction).

The *Ward* Court stressed that a regulation need not be the least intrusive means of serving the government's interests, but "this standard does not mean that a time, place, or manner regulation may burden substantially more speech than is necessary to further the government's legitimate interests." *Ward*, 491 U.S. at 798-99. The *Ward* Court held that while the means chosen may not be substantially broader than necessary to achieve the government's interest, the regulation will not be invalid merely because less-restrictive alternatives exist. See *id.* at 800.

Courts have applied these tests to various situations. For example, in *Martin v. City of Struthers*, the Supreme Court held that an ordinance which prohibited knocking on doors and ringing doorbells to distribute handbills or circulars violated the First Amendment. See *Martin*, 319 U.S. 141 (1943). In *Martin*, an individual was convicted of violating a city ordinance which prohibited knocking on doors and ringing doorbells to distribute leaflets or circulars. See *id.* at 142. Similarly, in *Graff v. Chicago*, the appellate court held that a city ordinance which required licenses for a sidewalk newsstand did not violate the First Amendment or the equal protection clause. See *Graff*, 9 F.3d 1309 (7th Cir. 1993). Richard Graff, a newsstand operator, brought an action challenging an ordinance which required him to obtain a permit. See *id.* at 1311. He argued that the ordinance violated the First Amendment as an unlawful restriction on free speech, and that it violated the equal protection clause because other non-expressive uses of the public streets (for example, sidewalk cafes) were treated differently under the ordinance. See *id.* at 1311-12.

96. 140 Misc. 2d 476, 477 (N.Y. Crim. Ct. 1988). In *Milbry*, the defendant received a ticket for vending his paintings without a license. See *id.* at 476. The General Vendors Law is the same statute that is at issue in *Bery*. See *Bery v. New York*, 97 F.3d 689, 694 (2d Cir. 1996), *cert. denied*, 117 S.Ct. 2408 (1997).

97. See *Milbry*, 140 Misc. 2d at 477.

was covered by the First Amendment.<sup>98</sup> The court upheld the law as constitutional, rejecting the argument that art should be treated in the same way as printed matter for First Amendment purposes.<sup>99</sup> Despite the First Amendment, the court noted that a municipality can still regulate expression under certain conditions.<sup>100</sup> Therefore, the court held the vending of artwork was receiving all the First Amendment protection to which it was entitled.<sup>101</sup> Additionally, the *Milbry* court pointed out that a distinction violates the Equal Protection Clause when it is based on content, not medium of expression.<sup>102</sup>

#### IV. NARRATIVE ANALYSIS

In *Bery*, the Second Circuit analyzed three issues:<sup>103</sup> (1) Was the plaintiffs' artwork entitled to First Amendment protection;<sup>104</sup> (2) if so, did the ordinance violate plaintiffs' First Amendment

98. *See id.* at 479.

99. *See id.*

100. *See id.* The court stated:

The phrase "First Amendment," however, is not equivalent to "open sesame." It has been consistently held that a municipal corporation has the right to regulate and license the use of public forums, even with respect to First Amendment activities, as long as the regulation relates reasonably to time, place, and manner, does not cut off other channels of communication, is content-neutral and does not vest in administrative officials the discretion to grant or deny a permit. They must serve a legitimate governmental function and be narrowly drawn.

*Id.* (citing *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981); *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 530 (1980); *Hynes v. Mayor and Council of Oradell*, 425 U.S. 610 (1976); *Erzonzik v. City of Jacksonville*, 422 U.S. 205 (1975); *United States v. O'Brien*, 391 U.S. 367 (1968)).

101. *See id.* at 479-80.

102. *See Milbry*, 140 Misc. 2d at 480 (citing *Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37 (1983)).

103. *See id.* In its analysis, the Second Circuit reviewed the denial of the preliminary injunction motions using an abuse of discretion standard. *See Bery*, 97 F.3d 689, 693 (2d Cir. 1996), *cert. denied*, 117 S.Ct. 2408 (1997). However, since the appellants were seeking vindication of First Amendment rights, the court reviewed the fact findings of the district court *de novo*. *See id.* The plaintiff brought the case on a motion for preliminary injunction. *See id.* Therefore, the plaintiffs were required to demonstrate that they were likely to suffer irreparable harm in the absence of the requested relief. *See id.* (citing *Sperry Int'l Trade, Inc. v. Israel*, 670 F.2d 8, 11 (2d Cir. 1982)). Violations of First Amendment rights are commonly considered irreparable injuries for purposes of a preliminary injunction. *See id.* (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (stating "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury")).

104. *See id.* at 694-96. For a discussion of the court's analysis of this issue, see *infra* notes 34-58 and accompanying text.

rights;<sup>105</sup> and (3) did the ordinance violate the equal protection clause of the Fourteenth Amendment?<sup>106</sup>

### A. First Amendment Protection of Artwork

The Second Circuit held that the plaintiffs' artwork was entitled to First Amendment protection.<sup>107</sup> According to the court, First Amendment protections are not limited to political speech, and thus the appellate court rejected the district court's view that the First Amendment's primary function was to protect political and religious views.<sup>108</sup> Rather, First Amendment protections extend to various forms of entertainment<sup>109</sup> as well as political demonstrations.<sup>110</sup> While the First Amendment is necessary for the preservation of political democracy, the court noted that the purpose of the First Amendment is to protect all manifestations of peaceful expression.<sup>111</sup>

Applying these concepts to the facts, the appellate court found that both the district court and New York City had an overly restric-

105. See *Bery*, 97 F.3d at 696-98. For a discussion of the court's analysis of this issue, see *infra* notes 59-95 and accompanying text.

106. See *Bery*, 97 F.3d at 699. For a discussion of the court's analysis of this issue, see *infra* notes 96-102 and accompanying text.

107. See *Bery*, 97 F.3d at 694-96.

108. See *id.*

109. See *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (holding First Amendment protects music); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (holding First Amendment protects theater); *Joseph Burstyn v. Wilson*, 343 U.S. 495 (1952) (holding First Amendment protects film); *Winters v. New York*, 333 U.S. 507 (1948) (holding First Amendment protects entertainment).

110. See *Gregory v. Chicago*, 394 U.S. 111 (1969) (concerning peaceful marches); *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969) (concerning peaceful marches); *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 505 (1969) (wearing black arm bands to evidence disapproval of involvement in Vietnam); *Brown v. Louisiana*, 383 U.S. 131 (1966) (relating to sit-ins by blacks to protest racial discrimination); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (concerning refusal to salute American flag).

111. See *Bery*, 97 F.3d at 694. Past cases have held that peaceful expression of non-political ideas are protected by the First Amendment. The *Bery* court cited *Abood v. Detroit Board of Education*, which stated that while a central purpose of the First Amendment was to protect free discussion of governmental affairs, "our cases have never suggested that expression about philosophical, social, artistic, economic, literary or ethical matters . . . is not entitled to full First Amendment protection." *Abood*, 431 U.S. 209, 231 (1976). See also *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (stating First Amendment "secures the right to proselytize religious, political, and ideological causes"); *Young v. American Mini Theatres*, 427 U.S. 50, 70 (1976) (plurality opinion) (holding protection of the First Amendment is fully applicable to communication of social, political, and philosophical messages); *Kingsley Pictures Corp. v. Regents*, 360 U.S. 684, 688 (1959) (upholding suppression of motion picture because it expresses idea that under certain circumstances adultery may be proper behavior strikes at heart of First Amendment protection).

tive view of the First Amendment.<sup>112</sup> Rejecting the district court's view that "art is farther from the core [of the First Amendment] than written word,"<sup>113</sup> the appellate court found that ideas portrayed by visual art are protected by the First Amendment.<sup>114</sup>

In its holding, the court rejected New York City's argument that the sale of art should receive less protection than the art itself.<sup>115</sup> The City argued that in order to receive constitutional protection, the sale of protected material must be "inseparably intertwined with a 'particularized message.'"<sup>116</sup> Consequently, the City argued that while the appellants were free to display their artwork without a license, they could not sell it.<sup>117</sup> Rejecting these arguments, the Second Circuit held that First Amendment protections extend to the sale of protected materials.<sup>118</sup> Finally, the Second Circuit disagreed with the district court's view that visual art, such as painting, photographs, prints and sculptures, should be treated the same way as crafts such as jewelry, pottery and silver making.<sup>119</sup> In the Second Circuit's view, art, as opposed to crafts, always attempts to convey a message to its viewer, and therefore, should receive First Amendment protection.<sup>120</sup>

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112. See *Bery*, 97 F.3d at 695. The court stated that the myopic vision of the District Court "not only overlooks case law central to the First Amendment jurisprudence but fundamentally misperceives the essence of visual communication and artistic expression." *Id.* Stressing that visual art is more than "mere merchandise," the court held that visual art is entitled to full First Amendment protection. *Id.* For a discussion of the District Court's analysis in *Bery*, see *supra* notes 26-30 and accompanying text.

113. *Bery v. New York*, 906 F. Supp. 163, 170 (S.D.N.Y. 1995).

114. See *Bery*, 97 F.3d 689, 695. The appellate court stated:

Visual art is as wide ranging in its depiction of ideas, concepts and emotions as any book, treatise, pamphlet or other writing, and is similarly entitled to full First Amendment protection. . . . The ideas and concepts embodied in visual art have the power to transcend . . . language limitations and reach beyond a particular language to both the educated and the illiterate.

*Id.* (footnotes omitted).

115. See *Bery*, 97 F.3d at 695.

116. *Id.* (citing *Young v. New York City Transit Authority*, 903 F.2d 146 (2d Cir. 1990)).

117. See *id.*

118. See *id.* See also *Riley v. National Fed'n of Blind of N.C.*, 487 U.S. 781, 801 (1988) (stating "[i]t is well settled that a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak"). Additionally, the *Bery* court noted that selling art on the streets is a part of the message of the art. *Bery*, 97 F.3d at 696. The plaintiff artists believe that art should be available to everyone, not just the wealthy. See *id.* Additionally, selling art on the streets showed that these artists were part of the "real world." *Id.*

119. See *Bery*, 97 F.3d at 695.

120. See *id.* The court stated that:

## B. First Amendment Analysis of the Constitutionality of the General Vendors Law

Once it determined that the First Amendment applied to the case, the appellate court addressed whether the ordinance violated the artists' First Amendment rights.<sup>121</sup> The court declined to decide whether the restriction was content-based or content-neutral, declaring that since the ordinance would fail under either test, it would merely apply the less stringent content-neutral test.<sup>122</sup>

Under the content-neutral test, a regulation may restrict the time, place and manner of protected speech if the regulation is "narrowly tailored to serve a significant governmental interest" and "leave[s] open ample alternative channels for communication."<sup>123</sup> Applying the test, the *Bery* court found that the city had a significant interest in keeping its public places safe and free of congestion.<sup>124</sup> The regulation, however, was not narrowly tailored enough to pass the test.<sup>125</sup> According to the court, the ordinance created a de

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While these objects may at times have expressive content, *paintings, photographs, prints and sculptures such as those appellants seek to display and sell in public areas of the City, always communicate some idea or concept to those who view it*, and as such are entitled to full First Amendment protection.

*Id.* (emphasis added).

121. *See id.*

122. *See id.* at 696. For a discussion of the constitutional analysis of content-neutral and content-based regulations, *see supra* notes 67-79 and accompanying text.

123. *Bery*, 97 F.3d at 696 (citing *Ward*, 491 U.S. at 791).

124. *See id.* at 696-97. However, the court noted that there was nothing on the record to show that New York needed to ensure street safety and lack of congestion. *See id.* *See also* *Wright v. Chief of Transit Police*, 558 F.2d 67, 68-69 (2d Cir. 1977) (city must find less restrictive alternatives than complete ban on newspaper vending in subways); *Loper v. New York City Police Dep't*, 999 F.2d 699, 704-05 (2d Cir. 1993) (street begging is expressive conduct which cannot be totally barred without unconstitutional interference with First Amendment rights).

125. *See Bery*, 97 F.3d at 697. The court noted that the failure of the district court to analyze narrow tailoring and alternative channels was an abuse of discretion. *See id.* at 697. In its analysis, the court noted that the ordinance is a de facto bar which prevents visual artists from selling their art in public places in New York City. *See id.* The court stated that the City may pass and enforce narrowly designed restrictions as to where artists may exhibit their art in order to keep the streets free of congestion, but the City may not ban an entire category of expression. *See id.* However, the court noted that the display of large, cumbersome works that would block public traverse on the streets could be subjected to discrete regulation as to time, place and location. *See id.* Additionally, both visual and written expression could be restricted by regulations addressed to particular areas of the City where public congestion might create physical hazards and public chaos. *See id.* *See also* *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941) (requiring license for parade is valid exercise of state public power to control time, place and manner of public access to public spaces); *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 760 (1988) (requiring vending machine license is valid exercise of state public power to control time, place and manner of public access to public spaces); *Gan-*

facto bar which prevented visual artists from exhibiting and selling their art in public areas.<sup>126</sup> The court held that the city could not ban an entire category of expression when more narrowly drawn regulations would suffice to accomplish the city's legitimate interest in keeping the streets and sidewalks free of congestion.<sup>127</sup>

Additionally, the court found that no alternative channels of communication were available to the artists.<sup>128</sup> According to the court, the public display and sale of art is a different form of expression than displaying art in museums or galleries.<sup>129</sup> Therefore, appellants were entitled to a public forum for their expressive activities.<sup>130</sup>

### C. Analysis of the General Vendors Law Under the Equal Protection Clause

Finally, the *Bery* court held that the ordinance violated the Equal Protection Clause.<sup>131</sup> According to the court, the ban on the sale of unlicensed art violated the Equal Protection Clause of the Fourteenth Amendment in light of the fact that persons who

nett Satellite Info. Network v. Metropolitan Transp. Auth., 745 F.2d 767 (2d Cir. 1984) (restricting right to distribute newspapers through newsracks on public property is valid exercise of state police power to control time, place and manner of public access to public spaces).

126. *See Bery*, 97 F.3d at 697. The court found that the cap on the total number of licenses made it all but impossible for the appellants to secure a license. *See id.* Richard Shrader, the former Commissioner of the New York City's Department of Consumer Affairs, stated that in his extensive experience, he never learned of an artist being licensed to sell art work. *See id.* at 697 n.7.

127. *See id.* at 697.

128. *See id.* at 698. The court recognized that artists could sell their artwork from their homes or in other private places, but found that they are entitled to a public forum for their activities. *See id.* at 698 (citing Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546, 556 (1975)).

129. *See id.* The court pointed out that art displayed on the street reaches people who might not choose to enter a gallery or museum. *See id.* The court wrote, "[a]ppellants are interested in attracting and communicating with the man or woman on the street who may never have been to a gallery and indeed who might never have thought before of possessing a piece of art until induced to do so on seeing appellant's work." *Id.* Additionally, the court noted that not all artists may be interested in or able to display their works in a gallery. *See id.*

130. *See id.*

131. *See Bery*, 97 F.3d at 699. The court stated that because the ordinance impinges on a fundamental right, the trial court erred in dismissing the artists' argument under a rational basis test. *See id.* For a discussion of the trial court's decision, see *supra* notes 26-30 and accompanying text.

wished to sell written material were not required to have a license.<sup>132</sup>

## V. CRITICAL ANALYSIS

The *Bery* court's holding that the General Vendors Law violated the First Amendment was based on its findings that (1) the visual expression at issue should receive as much First Amendment protection as written expression, and (2) the ordinance was not narrowly tailored.<sup>133</sup> In reaching these unprecedented conclusions, the Second Circuit relied on expansive interpretations of existing law. First, in determining that visual and written expression should receive the same amount of First Amendment protection, the Second Circuit broadly interpreted the First Amendment to provide more protection to art than it had previously received.<sup>134</sup> Second, the *Bery* court failed to apply the Supreme Court's analysis in *Taxpayers for Vincent* when examining whether the General Vendors Law was narrowly tailored.<sup>135</sup>

### A. First Amendment Protection of Visual Expression

In *Bery*, the Second Circuit criticized the district court's finding that the artwork at issue was not entitled to First Amendment protection.<sup>136</sup> The Second Circuit took the position that visual art is entitled to the same First Amendment protection as written works.<sup>137</sup> This assertion is unprecedented in the degree of First Amendment protection it provides to art and visual images.<sup>138</sup>

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132. See *Bery*, 97 F.3d at 699. The *Bery* court's equal protection decision will not be discussed further in this Note, except as it relates to the First Amendment holding.

133. For a discussion of the Second Circuit's analysis in *Bery*, see *supra* notes 103-32 and accompanying text.

134. For a critical discussion of the law relied on by the Second Circuit, see *infra* notes 136-53 and accompanying text.

135. For a discussion of the *Bery* court's analysis of the narrow tailoring of the General Vendors Law, see *supra* notes 125-30 and accompanying text.

136. See *Bery*, 97 F.3d at 695. The appellate court stated that "Both the court and the City demonstrate an unduly restricted view of the First Amendment and of visual art itself. Such myopic vision not only overlooks case law central to First Amendment jurisprudence, but fundamentally misperceives the essence of visual communication and artistic expression." *Id.*

137. See *id.*

138. See, e.g., *Piarowski v. Illinois Community College Dist.* 515, 759 F.2d 625 (7th Cir. 1985) (stating "the freedom of speech and of the press protected by the First Amendment has been interpreted to embrace purely artistic as well as political expression . . . unless the artistic expression is obscene"); *Close v. Lederle*, 424 F.2d 988 (1st Cir. 1970) (rejecting the proposition that art receives as much First Amendment protection as political or social speech); *Sefick v. Chicago*, 485 F.

In reaching its conclusion, the Second Circuit's reliance on *West Virginia State Board of Education v. Barnette*<sup>139</sup> was misplaced. Although the *Barnette* decision protects visually symbolic speech, it is not clear that visual art rises to the same level of "symbolic speech" protected in *Barnette*.<sup>140</sup> Moreover, other courts have rejected the view that art should receive the level of First Amendment protection which the *Bery* decision provides.<sup>141</sup> For example, in *Close v. Lederle*,<sup>142</sup> the First Circuit rejected the plaintiff's assertion that art receives as much Constitutional protection as political or social speech.<sup>143</sup> Rather, the court found that there are varying degrees of First Amendment protection.<sup>144</sup> Similarly, in *San Francisco Street Artists Guild v. Scott*,<sup>145</sup> the court found that sale of artifacts did not rise to the same level of expression as parades or the wearing of armbands.<sup>146</sup> The *Bery* court did not address this precedent in its decision.<sup>147</sup> Rather, the court's holding was based on its findings

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Supp. 644 (N.D. Ill. 1979) (holding First Amendment is meant to embrace purely artistic expression); *San Francisco Street Artists Guild v. Scott*, 37 Cal. App. 3d 667 (App. Ct. 1974) (holding sale of artifacts does not reach same level of protected expression as parades or wearing armbands); *People v. Milbry*, 140 Misc. 2d 476 (N.Y. Crim. Ct. 1988) (stating pictorial artwork is covered by First Amendment). See also *supra* notes 37-58 and accompanying text.

139. 319 U.S. 624 (1943). The court cited *Barnette* to support its proposition that visual images are an effective method to communicate ideas. For a discussion of *Barnette*, see *supra* note 35 and accompanying text.

140. See *Barnette*, 319 U.S. at 632 (discussing symbols such as flags, uniforms, crowns, altars, and salutes). For a discussion of the facts and holding of *Barnette*, see *supra* note 35 and accompanying text.

141. See *Close v. Lederle*, 424 F.2d 988 (1st Cir. 1970) (holding art does not receive same amount of First Amendment protection as political or social speech); *San Francisco Street Artists Guild v. Scott*, 37 Cal. App. 3d 667 (App. Ct. 1974) (holding artifacts and crafts not entitled to same amount of First Amendment protection as certain other forms of expression).

142. 424 F.2d 988 (1st Cir. 1970). For a discussion of the facts and holding of *Close v. Lederle*, see *supra* notes 45-47 and accompanying text.

143. See *Close*, 424 F.2d at 989-90.

144. See *id.* at 990. The *Close* court stressed that art which is not seeking to express political or social thought will not receive as much protection as more political speech. See *id.*

145. 37 Cal. App. 3d 667 (App. Ct. 1974). For a discussion of the facts and holding of *San Francisco Street Artists Guild*, see *supra* notes 48-49 and accompanying text.

146. See *San Francisco Street Artists Guild*, 37 Cal. App. 3d at 671. The *San Francisco Street Artists Guild* court stated that "the sale of the described artifacts does not reach this high level of expression, even though the items sold may have about them something of the personality of their creators." *Id.*

147. See *Bery*, 97 F.3d at 694-96. It is important to note that most of these cases, with the exception of *Serra*, were not binding on the *Bery* court. However, it is the author's view that these cases are highly persuasive.



that visual images are a powerful way to communicate ideas.<sup>148</sup> However, the court did not provide a clear analysis of where First Amendment protection ends.<sup>149</sup>

The *Bery* court declined to decide whether the regulation at issue was content-neutral or content-based, stating that it was not clear that the regulation was content-neutral.<sup>150</sup> This observation was based on the fact that the ordinance distinguished between written and visual expression.<sup>151</sup> However, the court's distinction rests on the assumption that written and visual expression receive the same First Amendment protection.<sup>152</sup> If visual expression actually receives less protection than written expression, it is perfectly logical that a content-neutral regulation might restrict visual expression, while leaving written expression unrestricted.<sup>153</sup>

### B. Narrow Tailoring of the General Vendors Law

The court's holding that the ordinance violated the First Amendment was heavily based on its finding that the ordinance was not narrowly tailored<sup>154</sup> and that alternative channels of communication did not exist.<sup>155</sup> Applying the standards enunciated in *Taxpayers for Vincent*,<sup>156</sup> the court found that although the city had a significant interest in maintaining cleanliness, the ordinance was not narrowly tailored.<sup>157</sup> In its analysis, the court relied on its find-

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148. See *id.* at 695. The court pointed out that visual images are often used in Third World countries so that those who are unable to read can recognize the party or candidate they wish to vote for. See *id.* Additionally, the court referred to Homer Winslow's paintings on the Civil War as an example of pictorial expression. See *id.*

149. See *id.*

150. See *id.* at 697. For a discussion of content-neutral and content-based regulations, see *supra* notes 67-79 and accompanying text.

151. See *Bery*, 97 F.3d at 696. The *Bery* court noted that "an entire medium of expression is being lost." *Id.* at 697.

152. For a discussion of the *Bery* court's analysis of this issue, see *supra* notes 112-14 and accompanying text.

153. See *Milbry*, 140 Misc. 2d at 480. The *Milbry* court noted that this may lead to a paradoxical outcome, because political artwork must be licensed and non-political written matter need not be. See *id.* Despite this, however, the *Milbry* court still found the regulation constitutional. See *id.*

154. For a discussion of the *Bery* court's analysis of the narrow tailoring issue, see *supra* notes 125-30 and accompanying text. The court's finding on narrow tailoring was largely based on the fact that licenses were nearly impossible to obtain. See *Bery*, 97 F.3d at 697.

155. For a discussion of the *Bery* court's analysis of the alternative channels of communication issue, see *supra* notes 128-30 and accompanying text.

156. For a discussion of the facts and holding of *Taxpayers for Vincent*, see *supra* notes 82-90 and accompanying text.

157. See *supra* notes 125-27 and accompanying text.

ing that the licensing cap in *Bery* created a de facto bar to the sale of art.<sup>158</sup>

Applying the reasoning of *Taxpayers for Vincent* to the facts of *Bery* could lead to a different result. The court in *Taxpayers for Vincent* addressed situations where the substantive evil is created by the expression itself, finding that in these cases, a complete ban on the expression would not violate the First Amendment.<sup>159</sup> New York City's purpose in passing the General Vendors Law was to eliminate the congestion caused by the presence of various vendors, including art vendors, throughout the city.<sup>160</sup> In certain areas of the city, such as Soho, many of the vendors on the streets and sidewalks were art vendors.<sup>161</sup> Therefore, in order to effectively reduce the congestion, the city would have to decrease the number of vendors present on the streets. Using the *Taxpayers for Vincent* analysis, one could argue that an ordinance which banned or severely curtailed the sale of art on the streets is narrowly tailored.

## VI. IMPACT

In its analysis of *Bery*, the Second Circuit granted unprecedented First Amendment protection to art and visual expression.<sup>162</sup> Although historically courts have accorded First Amendment protection to art in some circumstances, that protection has been limited and narrow.<sup>163</sup> The Second Circuit's holding that art should receive the same amount of First Amendment protection as written materials is unprecedented in the amount of protection it provides to art and visual expression.<sup>164</sup> This expansive view could have far-reaching implications, possibly providing visual images with the same amount of First Amendment protection received by political and symbolic expression.<sup>165</sup> By providing art with this level of pro-

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158. See *Bery*, 97 F.3d at 697.

159. See *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 808-09 (1984).

160. See *supra* note 21 and accompanying text.

161. See *supra* note 21.

162. For a critical discussion of the broad view applied in *Bery*, see *supra* notes 133-57 and accompanying text.

163. For a discussion of this issue, see *supra* notes 36-54 and accompanying text.

164. See *supra* notes 37-58 and accompanying text.

165. For example, in a recent case, the district court held that a law which banned sexually explicit materials in audio tapes, periodicals, and films, but not sexually explicit material in books, violated both the First Amendment and the Equal Protection Clause. *General Media Communications, Inc. v. Perry*, 952 F. Supp. 1072 (S.D.N.Y. 1997) (citing *Bery*, 97 F.3d at 696, 699). The court also pointed out that the law at issue in *General Media* distinguished between written

tection, the court effectively limited cities' abilities to regulate the public sale of art.<sup>166</sup>

Although the Supreme Court has denied *certiorari* in *Bery*, it is clear that the *Bery* decision creates controversy for courts attempting to determine how much protection the First Amendment accords to visual expression.<sup>167</sup> Undoubtedly, this decision will influence future judicial interpretations of the First Amendment's protection of visual expression.<sup>168</sup> As a result, the potential effects of the Second Circuit's decision in *Bery* will generate controversy among the courts until the Supreme Court considers the issue.

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and visual expression, and proscribed only visual expression. *See id.* For this reason, the *General Media* court applied strict scrutiny and found that the law violated the First Amendment. *See id.* Similarly, at least one commentator has cited *Bery* to support the proposition that "art need not . . . express identifiable ideas in order to receive First Amendment protection." *See Mach, supra* note 1 at 388 and n.22.

166. *See Bery*, 97 F.3d at 698-99. Interestingly, artists in New York still face restrictions on their ability to sell art in public places. In 1998, the City Department of Parks and Recreation issued rules which required artists to get a license to sell art on the Fifth Avenue sidewalk near the Metropolitan Museum of Art. *See Somini Sengupta, Artists Arrested in Raucous Rally Against Sales Permits Near Museum*, N.Y. TIMES, March 2, 1998, at B1. In defense of the new rules, Parks Department officials stated that the Second Circuit's decision in *Bery* did not apply to the Parks Department property. *See id.* On March 1, 1998, the artists staged a protest, holding up pictures of Mayor Giuliani that likened him to a police state dictator and singing "God Bless America." *See id.* During the protest, sixteen artists received tickets for selling their art in front of the museum without permits. *See id.* Each ticket carries a fine of up to \$1000. *See id.* Additionally, four artists were arrested as a result of the protest. *See id.*

167. *See* 117 S.Ct. 2408 (1997) (denying *certiorari*).

168. *See supra* note 161 and accompanying text.